

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICKI HELMAN-JONES and	:	
PAUL D. JONES, h/w	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 00-6432
	:	
ANHEUSER-BUSCH, INC.,	:	
BALL-FOSTER GLASS CONTAINER	:	
CO., L.L.C.,	:	
WANTZ DISTRIBUTORS, INC., and	:	
DENNIS GIGEOUS and DEBRA GIGEOUS,	:	
t/a STOP N' SHOP LIQUORS,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM

ROBERT F. KELLY, J.

FEBRUARY 21, 2001

Before the Court is the Motion to Remand filed by the Plaintiffs, Vicki Helman-Jones and Paul D. Jones ("Plaintiffs"). The Plaintiffs seek a remand of their product liability case to the Common Pleas Court of Philadelphia County, Pennsylvania. For the reasons that follow, the Plaintiffs' Motion is granted.

I. FACTS.

The Plaintiffs filed their product liability suit in the Philadelphia Common Pleas Court on November 21, 2000. Defendants, Anheuser-Busch, Inc. ("A-B") and Ball-Foster Glass Container Co., L.L.C. ("Ball-Foster"), filed their Notice of Removal with this Court on December 19, 2000, "premised upon diversity of citizenship, 28 U.S.C. § 1332(a)(1)." (Notice of Removal, ¶ 1.) Attached to the Notice of Removal was a letter

from counsel for Defendant Wantz Distributors, Inc. in which the attorney states "I have no objection to removal of this case to Federal Court of the Eastern District of PA." (Notice of Removal, Ex. A.) The Plaintiffs thereafter filed this Motion to Remand on January 18, 2001, and the Defendants, Dennis Gigeous and Debra Gigeous t/a Stop N' Shop Liquors ("Stop N' Shop"), filed a consent to the notice of removal on January 22, 2001.

III. DISCUSSION.

The Plaintiffs seek remand to the Philadelphia Common Pleas Court because all Defendants did not consent to removal as required by 28 U.S.C. § 1446,¹ and the amount in controversy is insufficient for this Court to have jurisdiction over this case. "Removal of cases from state court is governed by 28 U.S.C. §§ 1441-1452. Removal is a statutory right, and defendants must comply strictly with the procedures to effect removal." Reed v. Flemming Foods East, Inc., No. CIV.A.99-109, 1999 WL 111468, at *1 (E.D. Pa. Mar. 3, 1999)(citation omitted). Under section 1446(b), a defendant must file a notice of removal:

within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days

¹Section 1446(a) provides that "[a] defendant or defendants desiring to remove any civil action . . . from a state court shall file in the district court . . . a verified petition containing a short and plain statement of the facts which entitled him or them to removal." 28 U.S.C. § 1446(a).

after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever is shorter.

28 U.S.C. § 1446(b). Further, "any doubts concerning the removal procedure should be resolved in favor of remand." Shepard v. City of Phila., No. CIV.A.00-6076, 2001 WL 92300, at *1 (E.D. Pa. Jan. 31, 2001)(citations omitted). "[W]here there is more than one defendant, all served defendants must join in the removal petition within thirty days of their receipt of pleadings from which removability may be ascertained." Fumo v. Gallas, No. CIV.A.00-4774, 2001 WL 115460 (E.D. Pa. Feb. 6, 2001)(citing Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995) and Lewis v. Rego Co., 757 F.2d 66, 68-69 (3d Cir. 1985)). Thus, the timeliness of A-B and Ball-Foster's Notice of Removal and their co-Defendants' consents to join depends on when the thirty day period began to toll.

Receipt of the Complaint by Stop N' Shop commenced tolling of the thirty day period as to Stop N' Shop since "[i]f the 'four corners' of the pleading state enough to discern the existence of federal jurisdiction, receipt of the pleading commences tolling of § 1446(b)'s 30 day period." Id.(citing Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48, 53-54 (1993)). Although the docket entries from the Philadelphia Common Pleas Court reveal that the state court affidavit of

service for Defendant Stop N' Shop was filed on December 20, 2000, but deputized service of the Complaint by the Sheriff of Washington County, Maryland was made on December 7, 2000.

(Defs.' Resp., Ex. A.) Stop N' Shop's consent to the Notice of Removal was filed on January 22, 2001. Because Stop N' Shop's consent to the Notice of Removal was filed after thirty days from the service date, its consent is untimely.

A-B and Ball-Foster, in their December 19, 2000 Notice of Removal, state "[a]ll defendants who have been served to date have consented in writing to this removal." (Notice of Removal at 3, ¶ 12.) Plaintiffs, in their Motion to Remand, correctly argue that because all Defendants, namely Stop N' Shop, did not join in the Notice of Removal, the removal was improper. In response, A-B and Ball-Foster interpret Plaintiffs' argument to be that the Defendants "must take the responsibility of determining whether or not the plaintiffs have properly served all defendants and in doing so, relieve the plaintiffs from their responsibility of notifying both the Court and other parties of said service." (Def.'s Resp. at 3, ¶ 10.) According to A-B and Ball-Foster, the United States Court of Appeals for the Third Circuit found a removal petition was sufficient when all counsel of record at the time of the removal consented to the removal.

(Id.)(citing Lewis v. Rego Co., 757 F.2d 66 (3d Cir. 1995)).²

In Prowell v. West Chemical Products, Inc., 678 F. Supp. 553 (E.D. Pa. 1988), Judge Huyett of this District Court distinguished the holding in Lewis as limited to cases where one of the defendants is not served with the complaint until after the petition for remand is filed. Id. at 554.³ In this case, as in Prowell, all Defendants were served before the petition for remand was filed. A-B and Ball-Foster employ a similar argument as the Prowell defendants, that it would be unfair to allow the Plaintiffs to defeat removal where the Plaintiffs failed to advise the Defendants that service had been made. Id. at 555. This Court agrees with Judge Huyett's analysis that:

the statute places no burden upon plaintiff to come forward with such information. The

²Although removal requires that defendants unanimously join or consent to the removal, "[t]he general rule may be disregarded when (1) the non-joining defendant is a nominal party; (2) a defendant [has] been fraudulently joined; or (3) when a non-resident defendant has not been served at the time the removing defendants filed their petition." Shepard v. City of Phila., No. CIV.A.00-6706, 2001 WL 92300, at *1 n.1 (E.D. Pa. Jan. 31, 2001)(citing Weinrach v. White Metal Rolling & Stamping Corp., No. CIV.A.98-3293, 1999 WL 46627, at *1 (E.D. Pa. Jan. 6, 1999)(quoting Balazik v. County of Dauphin, 44 F.3d 209, 213 n.4 (3d Cir. 1995))). None of these exceptions are at issue in this case.

³Judge Huyett recognized the Lewis decision interpreted the removal statute as "'contemplat[ing] that once a case has been properly removed the subsequent service of additional defendants who do not specifically consent to removal does not require or permit remand on a plaintiff's motion.'" Prowell v. West Chem. Prods., Inc., 678 F. Supp. 553, 554-555 (E.D. Pa. 1988)(quoting Lewis, 757 F.2d at 69).

burden is upon the defendants to comply with the requirements for removal. The placement of this burden upon defendants does not work any injustice. . . . Moreover, defendants' petition contained no assertion that they had attempted to ascertain whether the remaining defendants had been served, and made no attempt to explain the failure of those defendants to join in the petition.

Id. at 555. Thus, the burden is on Defendants, not Plaintiffs, to show compliance with the removal statutes. Here, A-B and Ball-Foster's Notice of Removal is procedurally deficient and does not meet the requirements of section 1446(b).

IV. CONCLUSION.

Because A-B and Ball-Foster did not comply with the procedural requirements of the removal statute, this case will be remanded to the Court of Common Pleas of Philadelphia County, Pennsylvania.⁴

An appropriate Order follows.

⁴In their Notice of Removal, A-B and Ball-Foster argue that jurisdiction in this case is proper pursuant to 28 U.S.C. section 1332(a)(1) because the parties are diverse and the amount in controversy exceeds \$75,000.00 since the Plaintiffs made an \$87,500.00 settlement demand. The Plaintiffs contend, however, that nothing in their Complaint substantiates an amount in controversy in excess of \$75,000.00 and thus, the "removing defendants improperly and disingenuously allege that plaintiffs have submitted a settlement demand of \$87,500.00." (Mot. to Remand at 3, ¶ 9.) Because the Motion to Remand can be granted based upon procedural deficiencies in the Notice of Removal, this claim is not addressed.

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	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 21st day of February, 2001, upon consideration of Plaintiffs' Motion to Remand (Dkt. Nos. 2, 5), and the Response thereto, it is ORDERED and DECREED that Plaintiffs' Motion is GRANTED and Plaintiffs' case is hereby REMANDED to the Court of Common Pleas of Philadelphia County, Pennsylvania. The Clerk of Court is ORDERED to mark this file CLOSED.

BY THE COURT:

Robert F. Kelly,	J.
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